NO. 85-161

Supreme Court, U.S.
FILED
AUG 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JESUS GARCIA, Petitioner

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Attorney

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JURISDICTION

Although petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1257(3), respondent respectfully submits that jurisdiction is not proper. While the underlying case is based upon the Federal Employers' Liability Act [45 U.S.C. Sections 51-60], that act is only indirectly involved.

The petition arises from the separate trial of respondent SOUTHERN PACIFIC TRANSPORTATION COMPANY'S affirmative defenses of compromise and accord and satisfaction. The only issue at trial was whether or not the case had been settled for $10,000. After hearing the evidence, the trial court ruled that it had been settled, finding as a fact that petitioner, JESUS GARCIA ("GARCIA") "had the settlement offer explained to him and on balancing the evidence that he understood and agreed to that settlement." Memorandum of Decision (CT 79-80). Judgment was entered for him in the amount of the settlement. Id. This writ petition involves nothing more than GARCIA'S disagreement with that decision.

The dispute as framed by the petitioner meets none of the "character of reasons" by which the Supreme Court reviews cases on Writ of Certiorari (Supreme Court Rules, Rule 17).

STATEMENT OF FACTS

GARCIA'S original Complaint alleged a back injury on November 16, 1977 while employed as a track laborer near Richmond, California (CT 1-3). The action was brought under the Federal Employers' Liability Act [45 U.S.C. Sections 51-60], alleging negligence on the part of defendant SOUTHERN PACIFIC TRANSPORTATION COMPANY, causing the accident.

Following the incident, GARCIA was examined and/or treated by several doctors. His own treating physicians, Doctors Dennis, Frierson, Shanser and Zwerin serially and independently diagnosed his injury as no more than low back strain. Two independent medical examinations yielded the same diagnosis.

Petitioner's attorney, Heber Teerlink, then arranged a seventh medical examination by a personal friend (RT 87:7-10; 211:5-13) with a reputation for

liberal analyses of plaintiffs' claims (RT 97:15-22). Dr. Genest found a 15 percent chance of a disc herniation causing nerve damage (RT 62:15-63:2) but believed it pre-dated the accident (RT 100:19-16; 120:5-10).

Armed with this information, Mr. Teerlink and counsel for SOUTHERN PACIFIC entered into settlement discussions. SOUTHERN PACIFIC contended below that these discussions resulted in settlement.

On respondent's motion, a separate trial was scheduled on the issue of whether or not there had been a valid settlement. The evidence was limited to circumstances to the date of settlement.

According to the testimony of Robert Popelka, attorney for respondent, a settlement offer was proposed on the morning of the date set for arbitration, May 14, 1980 (RT 42:5-14). Later that day, Heber Teerlink, GARCIA'S counsel,

communicated his client's agreement to the settlement to Mr. Popelka (RT 43:12-15).

Mr. Teerlink's testimony substantiated the events as set forth by Mr. Popelka. He presented to GARCIA the proposed settlement (RT 91:26), explaining that acceptance would end the lawsuit (RT 137:15-21). GARCIA accepted (RT 92:1-3; 92:20-22; 95:4-8; 144:12-25) and Mr. Teerlink communicated that acceptance to Mr. Popelka (RT 95:2 -96:2). While Mr. Teerlink expressed some concern that GARCIA may have been confused as to the effect of the settlement agreement (RT 109:8-15), no such confusion was expressed by either Mr. or Mrs. GARCIA in their meeting with Mr. Teerlink on May 14, 1980 (RT 142:13-18) and neither party testified to any such confusion.

Not surprisingly, GARCIA testified to not having accepted the settlement offer (RT 194:24-195:1); as noted, Mr. Teerlink

testified he did. The Court believed Mr. Teerlink.

REASONS FOR DENYING THE PETITION

I

THERE WAS NO RIGHT TO JURY TRIAL

Minneapolis & St. Louis Railway Company v. Bombolis (1916) 241 U.S. 211 is the governing authority regarding the right to jury trial in F.E.L.A. cases in the state courts. Bombolis holds that: (1) The Seventh Amendment does not apply to proceedings in state courts and (2) an F.E.L.A. plaintiff who chooses to proceed in state court has the same right to a jury trial as the state affords a common-law negligence plaintiff, and no more.

At the California Court of Appeals, GARCIA neglected to address Bombolis and chose to rely instead upon Dice v. Akron, Canton & Youngstown Railroad Co. (1951) 342 U.S. 359, despite the fact that the Dice court did not disavow Bombolis, but distinguished it:

> The Bombolis case might be more in point had Ohio abolished trial by jury in all negligence cases including those under the federal act. Dice v. Akron, Canton & Youngstown Railroad Co. 342 U.S. 362-363.

California adheres to the mandate of Bombolis, giving the F.E.L.A. plaintiff exactly the same jury trial as every other civil litigant, without violating Dice by denying jury trials in negligence cases. No civil litigant has a right to jury trial on the issue of settlement. California Code of Civil Procedure Section 592; Hartman v. Burford (1966) 242 Cal.App. 2d 268; Schaefer v. United Bank and Trust Company (1930) 104 Cal.App. 635; Ostrom v. DeYoe (1906) 4 Cal.App. 326.

Although GARCIA would lead this Court to believe that a large body of case law holds that factual issues regarding F.E.L.A. releases must be decided by the jury, his authorities are not on point, at best, and misleading at worst. Not one of

the following cases cited by GARCIA involved a dispute over who --Court or jury-- should decide the facts: Graham v. Atchison, T&SF Ry. Co. (9th Cir. 1949) 176 F2d 819 (directed verdict); Cratsley v. Pittsburgh & Lake Erie Ry. Co. (WD Pa. 1967) 272 F.Supp. 330 (summary judgment denied); Callen v. Pennsylvania R. Co. (1948) 332 U.S. 625 (erroneous jury instructions); Maynard v. Durham & Southern Ry. Co. (1961) 365 U.S. 160 (non-suit); Johnson v. Elgin, J&E Ry.Co. (Ill. 1949) 87 NE 2d 567 (directed verdict); and Allison v. Chicago Great Western Ry. Co. (Minn. 1954) 62 NW 2d 374 (judgemnt notwithstanding the verdict).

Kozar v. Chesapeake & Ohio Ry. Co. (WD Mich. 1970) 320 F.Supp. 335, a district court opinion cited by petitioner, states that F.E.L.A. releases are void under 45 U.S.C. Section 55. Kozar is clearly wrong; see Callen v.

Pennsylvania Ry. Co. (1948) 332 U.S. 625, 630.

While the trial court correctly applied state law, its decision was also in accord with federal law. In Warner v. Rossignol (1st Cir. 1975) 513 F.2d 678, the defendant sought specific enforcement of a settlement contract the plaintiff refused to carry out.

> Specific performance is an equitable defense...within the province of a judge sitting without a jury to make the necessary findings of fact and rulings. Id. at 683-684.

Bifurcation to separately try defendant's special defenses is authorized by California Code of Civil Procedure Section 597, and was not contested by the petitioner here. The federal courts have approved the same procedure in an F.E.L.A. case factually similar to the instant case. In Kiloski v. Pennsylvania R. Co. (DC Del. 1952) 103 F.Supp. 390 the court granted defendant's motion for a separate

trial, first and before a judge sitting without a jury, of the affirmative defenses of accord and satisfaction and release because the plaintiff's conduct created the release issue. Id. at 391.

II

PETITIONER'S ACCORD AND SATISFACTION AGREEMENT IS IRRELEVANT

It is interesting to note that petitioner couples his demand for jury trial with a separate argument seeking a declaration that no accord and satisfaction was reached "as a matter of law." It is axiomatic that questions of law are decided by the court. Rice v. Southern Pacific Co. (1967) 247 Cal.App.2d 701, 706.

Nonetheless, respondent SOUTHERN PACIFIC TRANSPORTATION COMPANY'S Supplemental Answer included two affirmative defenses: compromise, and accord and satisfaction (CT 34-35), both

of which were ordered into a separate trial pursuant to California Code of Civil Procedure Section 597 (CT 44-45). The trial court's Memorandum of Decision in support of the judgment indicated only that "plaintiff JESUS GARCIA authorized settlement...judgment may be entered accordingly." (CT 79-80). Under such circumstances, the petitioner's focus on the law of accord and satisfaction, and the corresponding lack of attention to the law of compromise, is curious.

Whatever the rules of accord and satisfaction,

> ...one who attacks a settlement must bear the burden of showing that the contract he made is tainted with invalidity, either by fraud practiced upon him, or by a mutual mistake under which both parties acted. Hohlweiler v. Pennsylvania R. Co. (1969) 294 F.Supp. 1377, aff'd. 436 F2d 1382, cert. den. 404 U.S. 884; Callen v. Pennsylvania R. Co. (1948) 322 U.S. 625, 630.

Petitioner alleges no fraud, nor does he draw to the attention of the respondent

or the Court any mutual mistake relied upon by both parties.

Again, whatever the rules pertaining to accord and satisfaction, the validity and enforceability of a compromise agreement are well established. In Kreling v. Walsh (1947) 77 Cal.App.2d 821, the trial court initially tried defendant's affirmative defense of an oral compromise agreement, found the agreement to have been made and entered judgment accordingly. In affirming, the Court of Appeals held:

> A contract to make or execute a written agreement, when in all respects the terms thereof are mutually understood and agreed upon, is as valid and obligatory where no statutory obligation interposes as the written contract would be if executed. Id. at 834.

That the underlying claim arises under the F.E.L.A. does not free it from the rules of contract law.

> The obligation to remain bound by a valid agreement of settlement duly entered into by counsel with the authority of his client is one which pervades the law and applies to injured railroad employees as well as all contracting parties. Good v. Pennsylvania R. Co. (3d Cir. 1967) 384 F.2d 989, 990.

Moreover, such an agreement is valid and binding despite the absence of any writing or formality. The tender of the release form does not invalidate the agreement or make execution of the release a condition to the settlement itself. Id.

Petitioner's reliance on Harrison v. Gooden (1st Cir. 1971) 439 F.2d 1070 is misplaced. Although the plaintiff in that case also dismissed his first attorney, that dismissal was not central to the court's ultimate ruling. Harrison was strictly an accord and satisfaction case, not a compromise case.

III

PETITIONER HAD NO FUNDAMENTAL RIGHT TO ARGUE IN OPPOSITION TO A MOTION IN LIMINE

California Code of Civil Procedure Section 2009 states "an affidavit may be used to verify a pleading...to prove the service of a summons...or upon a motion." The section was construed by the California Supreme Court to allow the trial court discretion to refuse oral testimony, determining motions on declarations alone. Beckett v. Kaynar Mfg. Co., Inc. (1958) 49 Cal.2d 695, 698, fn.3.

Petitioner's case parallels Muller v. Muller (1956) 141 Cal.App.2d 722, an appeal from an order denying a motion to reopen the case for reception of evidence. The appellant claimed he was erroneously prevented from arguing the previously denied motion and prevented from presenting oral evidence in support of his

motion to reopen. The trial court's actions were upheld on the basis of California Code of Civil Procedure Section 2009 and case law:

> ...a trial judge is not required to listen to oral arguments in support of a motion, but may, in his discretion, decide it solely on the basis of the supporting affidavits [citations]. Id. at 731.

Despite this broad discretion, the trial court allowed GARCIA to continue argument (RT 8:23-25) until the matter was submitted for the court's determination (RT 10:16-17).

In any event, petitioner does not challenge the correctness of the trial court's ruling; any error in limiting argument is harmless if the ruling is correct.

IV

CONCLUSION

For the foregoing reasons, respondent SOUTHERN PACIFIC TRANSPORTATION COMPANY respectfully requests the denial of a Writ of Certiorari to the Supreme Court of the State of California.

DATED: August 12, 1985.

POPELKA, ALLARD, McCOWAN, JONES & HOWARD

By: _____
BRUCE NYE

Attorneys for Respondent
SOUTHERN PACIFIC TRANSPORTATION COMPANY

CERTIFICATE OF SERVICE

I, the undersigned say: I am and was at all times herein mentioned a citizen of the United States employed in the County of San Francisco, State of California, over the age of 18 years and not a party to the within action; I am employed in the office of a member of the bar of this court at whose direction service was made and my business address is 601 Montgomery Street, Suite 2020, San Francisco, California 94111. On August 12, 1985, I served the foregoing Response to Petition for Writ of Certiorari to the Supreme Court of the State of California on the petitioner of said action by placing three true copies thereof in an envelope addressed to the attorney of record of said party at the office adress of said attorney as follows:

Leo M. O'Connor, Esq.
Leo M. O'Connor, Inc.
A Professional Corporation
629 J Street, Third Floor
Sacramento, California 95814

and by then sealing said envelope and depositing the same with postage thereon fully paid in the United States mail at San Francisco, California, where is located the office of the attorney for the person by and for whom service has been made.

There is delivery service of the United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

I certify under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California on August 12, 1985.

Patricia C. Thompson

Patricia C. Thompson